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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE LARRY A. BURNS**)

UNITED STATES OF AMERICA,	)	CASE NO. 07CR3161-LAB
Plaintiff,	)	DATE: June 10, 2008 TIME: 9:00 a.m.
v.	)	
GENARO SMITH-BALTIHER,	)	DEFENDANT'S PROPOSED THEORY OF DEFENSE JURY INSTRUCTIONS
Defendant.	)	

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND
PAUL STARITA, ASSISTANT UNITED STATES ATTORNEY.

Mr. Smith-Baltiher, by and through his counsel, Joseph M. McMullen, and Federal Defenders of San Diego, Inc., and pursuant to Federal Rule of Criminal Procedure 30, requests that the Court instruct the jury on the law as set forth herein. Mr. Smith-Baltiher also requests leave to offer further jury instructions as may become relevant during the course of the trial.

Respectfully submitted,

Dated: June 6, 2008

/s/ Joseph M. McMullen
JOSEPH McMULLEN
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Smith-Baltiher

COURT'S INSTRUCTION NO. _______

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

A natural-born citizen of the United States includes a person born outside the United States of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

Authority:

"The term 'derivative citizenship' refers to citizenship that a child may derive *after birth* through the naturalization of a parent. See 7 C. Gordon et al., 7 Immigration Law and Procedure § 98.03[1] (2003). It is distinct from the acquisition of citizenship *at birth*, including the "citizenship by descent" that may be conferred on a child born abroad to a citizen parent. See id.; see also INA § 301(c), (d), (e), (g), 8 U.S.C. § 1401(c), (d), (e), (g) (2000) (examples of INA provisions conferring citizenship by descent)." Memorandum Opinion for the Acting Principal Legal Advisor, Bureau of Citizenship and Immigration Services, Department of Homeland Security, available at http://www.usdoj.gov/olc/2003/ins_opinion.pdf (July 24, 2003) (emphasis in original).

"The following shall be nationals and citizens of the United States *at birth*: ... (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years." 8 U.S.C. § 1401(g) (2007) (This provision "shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date."); see also United States v. Smith-Baltiher, 424 F.3d 913, 921 n.8 (9th Cir. 2005) ("8 U.S.C. § 1401(g) provides that Smith is entitled to derivative citizenship if prior to his birth his mother was both a United States citizen and physically present in the U.S. for a period of not less than five years, at least two of which were after attaining the age of fourteen.").

GIVEN __________

GIVEN AS MODIFIED __________

REFUSED __________

COURT'S INSTRUCTION NO. _______

DEFENDANT'S PROPOSED INSTRUCTION NO. _2___

In deportation proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, and the burden then shifts to the person in removal proceedings to prove United States citizenship. In a criminal trial, the burden of proof never shifts to the defendant and the government always bears the burden of proving beyond a reasonable doubt that the defendant is an alien.

Authority:

> "In deportation proceedings, the INS has the burden of establishing the facts supporting deportability by 'clear, unequivocal, and convincing evidence.' Woodby v. INS, 385 U.S. 276, 277, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966); see also Murphy v. INS, 54 F.3d 605, 608 (9th Cir.1995). Evidence of foreign birth, however, gives rise to a rebuttable presumption of alienage, and the burden then shifts to the petitioner to prove citizenship. See Corona-Palomera v. INS, 661 F.2d 814, 818 (9th Cir.1981); see also Matter of Leyva, 16 I. & N. Dec. 118, 119 (BIA 1977)." Scales v. Immigration and Naturalization Service, 232 F.3d 1159, 1163 (9th Cir. 2000).

> "Under the charged offense, a previously deported alien who 'enters, attempts to enter, or is at any time found in' the United States without the express consent of the Attorney General is subject to a fine and imprisonment for up to two years. See 8 U.S.C. § 1326. As in all other criminal trials, the government must prove its case beyond a reasonable doubt. Sitting *en banc*, we held in United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir.2000) (*en banc*), that the defendant's alienage is an essential element of the § 1326 offense and that the government must carry its burden with respect to that element just as it does with all others." United States v. Smith-Baltiher, 424 F.3d 913, 921 (9th Cir. 2005).

GIVEN __________

GIVEN AS MODIFIED __________

REFUSED __________

COURT'S INSTRUCTION NO. _______

DEFENDANT'S PROPOSED INSTRUCTION NO. _3___

The right of a natural-born United States citizen to be treated as a United States citizen is not dependent on the issuance of a certificate of citizenship or on any other formal determination by any government official regarding citizenship.

Authority:

> "The government's argument is incorrect. Smith was entitled to U.S. citizenship, along with its rights and privileges,*921 from the moment of birth, not upon the issuance of a certificate of citizenship or any other formal determination by the INS or any other government official. See 8 U.S.C. § 1401(g) (stating that derivative citizens are "nationals and citizens of the U.S. at birth " (emphasis added)); Miller v. Albright, 523 U.S. 420, 429-30, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (plurality opinion) (holding that 8 U.S.C. § 1401(g) provides for citizenship at birth); Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1092-94 (9th Cir.2005) (same). In short, if Smith is entitled to U.S. citizenship as derived through his mother, his right to be treated as a citizen is not dependent upon the award of a certificate. He was a citizen from the moment of his birth. See 8 U.S.C. § 1401(g)." United States v. Smith-Baltiher, 424 F.3d 913, 920-21 (9th Cir. 2005).

GIVEN __________

GIVEN AS MODIFIED __________

REFUSED __________

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing is true and accurate to the best information and belief, and that a copy of the foregoing document has been caused to be delivered this day upon:

Courtesy Copy to Chambers

Copy to Assistant U.S. Attorney via ECF NEF

Copy to Defendant

Dated: June 6, 2008

/s/ Joseph M. McMullen

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